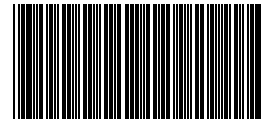




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Written Submissions

COURT DETAILS

Court	Supreme Court of NSW
Division	Equity
List	Corporations List
Registry	Supreme Court Sydney
Case number	2015/00237028

TITLE OF PROCEEDINGS

First Plaintiff	Stephen Ernest Vaughan and Ian Richard Hall in their capacity as Liquidators of BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777
Second Plaintiff	BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777
First Defendant	J Mazzetti Pty Ltd ATF J Mazetti Pty Limited Staff Superannuation Fund & ORS ACN 006705602
Second Defendant	Peter Brian Haywood and Bronwen Menai Haywood as trustees for the Haywood Superannuation Fund
Number of Defendants	4

FILING DETAILS

Filed for	BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777, Corporation subject of the proceedings 1 Stephen Ernest Vaughan and Ian Richard Hall in their capacity as Liquidators of BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777, Plaintiff 1 BBY Limited (Receivers and Managers Appointed)(In Liquidation) ACN 006 707 777, Plaintiff 2
Legal representative	EMANUEL JOHN POULOS
Legal representative reference	
Telephone	02 9258 6000
Your reference	02-3003-4959

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Plaintiffs' summary of contentions.pdf)

[attach.]

IN THE SUPREME COURT OF NEW SOUTH WALES
 DIVISION: EQUITY DIVISION
 REGISTRY: SYDNEY
 CORPORATIONS LIST

No. 237028 of 2015

IN THE MATTER OF BBY LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)

PLAINTIFFS' SUMMARY OF CONTENTIONS

A Introduction

1. The plaintiffs intend to adopt a neutral approach to the controversial issues in the proceeding, consistently with their duties: *In Re MF Global Australia Ltd (in liq)* (2012) 267 FLR 27; [2012] NSWSC 994 (*MF Global*) at [2]. Notwithstanding the plaintiffs' duty of neutrality in relation to controversial issues, the plaintiffs intend to identify any practical difficulties that may attend particular approaches to issues in the proceeding and/or the modelling that is to occur (without suggesting that the plaintiffs would oppose a different approach).

B Treatment of client segregated accounts and foreign currency

2. The starting point is that "*the account*" in reg 7.8.03(6) of the *Corporations Regulations 2001* (Cth) refers to a single account so that the regulation does not require pooling of any accounts where those accounts are conducted separately.¹
3. However, other than perhaps for the Equity and ETO product lines, there does not appear to have been any process or record of BBY Limited (receivers and managers appointed) (in liquidation) (**BBYL**) which constitutes a reliable reconciliation of the contributions and withdrawals of each client with the amounts held in particular client segregated accounts (**CSAs**). In those circumstances the plaintiffs contend that it is appropriate, at least for product lines other than Equity/ETO, that CSAs designated for the same product line are treated as a single "pool" for that product line.² The plaintiffs also note that BBYL's reconciliation of its Equity/ETO CSAs was a reconciliation of the overall balance of the CSA with the amount BBYL regarded itself as obliged to hold on trust for Equity/ETO clients. It was not in the nature of a trust accounting in which every transaction on the relevant CSA was reconciled to particular client accounts.³
4. The plaintiffs do not contend for any particular position in relation to the pooling or grouping of CSAs between different product lines.⁴ That issue is likely to be central and controversial.
5. There are CSAs denominated in foreign currency that are designated for the FX, Futures and Saxo product lines. In each of those product lines:
 - (a) there is an overall shortfall between the estimated quantum of client claims and the quantum of assets available or expected to become available;⁵ and

¹ *MF Global* at [47]–[48].

² See *MF Global* at [50] and [52].

³ Affidavit of Stephen Ernest Vaughan affirmed on 23 December 2015 at [260–263]. The nature of BBYL's reconciliation of its Equity/ETO CSAs is set out at [262].

⁴ As to the relevant principles, see *MF Global* at [49].

⁵ Client monies investigations Liquidators' Supplementary Report (**Supplementary CSA Report**) at [12.1].

(b) in many cases, there is a shortfall between the estimated quantum of client claims denominated in a currency and the quantum of assets available or expected to become available in that currency.⁶

6. The following practical considerations support converting foreign currency amounts into Australian dollars:

(a) conversion would permit the plaintiffs to create a fund (for each product line) in a single currency from which monies could be distributed rateably. It is not possible to distribute foreign currency amounts to satisfy foreign currency claims in full given the shortfall in currency described above;

(b) it would reduce administration costs including in respect of calculating dividends;

(c) the plaintiffs expect that the majority of clients may in any event prefer to receive distributions in Australian dollars; and

(d) conversion into Australian dollars appears to be consistent with the terms and conditions that applied to the relevant product lines.⁷

C Recoveries

7. The Recoveries⁸ may be grouped into two categories. First, recoveries from counterparties⁹ where BBYL acted as agent for clients (i.e. ASX, ABN Amro, ADM and perhaps in part, IB) (**ET Recoveries**).¹⁰ Second, recoveries from counterparties where BBYL was acting as principal (i.e. Halifax, CMC Markets, SCMA and perhaps in part, IB) (**OTC Recoveries**).¹¹

8. In the circumstances of *MF Global*, it was held that recoveries that might be thought to be similar to the ET Recoveries were paid in connection with a financial service provided to clients (s 981A(1)(a)(i)) and to the licensee in its capacity as a person acting on behalf of clients (s 981A(b)(iii)): *MF Global* at [189] (Black J). If that approach were followed, the ET Recoveries would be subject to Pt 7.8 Div 2 Subdiv A of the *Corporations Act 2001* (Cth) (**Corporations Act**) and could be dealt with in the same way as other client monies in the same product line (i.e. grouped or pooled on the same basis as the CSAs within a corresponding product line). For example, the recoveries from ABN Amro and ADM could be dealt with in the same manner as the Futures CSAs.

9. As the first defendants have contended that they are exclusively entitled to the Returned Collateral (which is the subject of the separate question application), depending upon the determination of that issue, that ET Recovery may be dealt with differently.

10. In the circumstances of *MF Global*, it was held that recoveries that might be thought to be similar to the OTC Recoveries were subject to Pt 7.8 Div 2 Subdiv A of the *Corporations Act*

⁶ Supplementary CSA Report at [13.2].

⁷ Desk FX Terms cl 3.8.4 and 9.4 (Client monies investigations Liquidators' Report (**CSA Report**), Appendix 14), Desk FX and Commodities PDS p 7 (CSA Report, Appendix 71), Online Account Terms cl 11.4 (CSA Report, Appendix 16), Online Trader PDS cl 3.1 (CSA Report, Appendix 17), Futures Terms, Part A, cl 19.2 (CSA Report Appendix 12).

⁸ "Recoveries" are defined in the plaintiffs' originating process filed 13 August 2015.

⁹ ASX Clear Pty Ltd (**ASX**), ABN Amro Clearing Sydney Pty Ltd (**ABN Amro**), ADM Investor Services International Limited (**ADM**), Halifax Investment Services Limited (**Halifax**), CMC Markets Asia Pacific Pty Ltd (**CMC Markets**) and Saxo Capital Markets (Australia) Pty Ltd (**SCMA**).

¹⁰ That is, exchange-traded Recoveries.

¹¹ That is, over-the-counter Recoveries.

on the basis that payments to the OTC counterparties were authorised by s 981D of the Corporations Act and client directions,¹² and payments were received from those counterparties by the licensee “on behalf of” clients: *MF Global* at [239]-[242].

11. The plaintiffs note that:
 - (a) ASX maintained "client-related" sub-accounts for BBYL's underlying clients (albeit ultimately in the name of BBYL as the clearing participant);
 - (b) SCMA and IB maintained sub-accounts for BBYL's underlying clients (albeit ultimately in the name of BBYL pursuant to omnibus arrangements); and
 - (c) ABN Amro, ADM, Halifax and CMC Markets did not maintain sub-accounts for BBYL's underlying clients.
12. Where BBYL's counterparty did not maintain sub-accounts for BBYL's underlying clients it is not practically possible to identify what cash held with that counterparty was attributable to particular clients.

D Calculation of client entitlements

13. The plaintiffs contend that it is not practically possible, based on the records of BBYL, to determine client entitlements other than according to a contractually-based approach (the alternatives being a contributions-based approach or a claims-based approach): see *MF Global* at [104]-[108] for a general description of these approaches. The manner in which BBYL operated the CSAs means that there are practical limitations to adopting a contributions-based or claims-based approach which are not present if a contractual-based approach to calculating entitlements is adopted.
14. To the extent that a contractually-based approach is adopted, there are two further issues. First, the method of calculation of contractually-based entitlements. Second, the date on which that calculation should occur.
15. The plaintiffs contend that the most reliable sources of information in quantifying client claims are:¹³
 - (a) in respect of the Equities and ETOs product lines:¹⁴
 - (i) the “Detailed Trust Position Report” as a record of cash claims;
 - (ii) the ASX reconciliation of the Returned Collateral as a record of claims in respect of open derivative positions that were closed out by the ASX;
 - (iii) the Receivers' Reconciliation as a record of claims in respect of margin calls made on ETO clients on 19 May 2015;

¹² Desk FX Terms cl 4.1 (CSA Report, Appendix 14), Desk FX and Commodities PDS p 8 (CSA Report Appendix 71), Online Account Terms cl 2.2(d), 2.3(b), 4.4 (CSA Report, Appendix 16), Online Trader PDS pp 48-49 (CSA Report, Appendix 17), Online Professional Futures and Derivatives PDS (CSA Report, Appendix 13), Online Professional FX and Commodities PDS p 9 (CSA Report, Appendix 15).

¹³ Although the liquidators believe the above documents to be the most reliable records of client entitlements as at the relevant dates, it is possible that other claims have subsequently arisen at various dates (eg, of the kind made by Ms Beatriz Martini, or claims arising from post-appointment transactions). Other claims of which the liquidators are aware were taken into account in the surplus/shortfall analysis set out in section 12 of the Supplementary CSA Report.

¹⁴ See CSA Report at [3.2.2] and [3.2.4].

- (iv) the "Unpresented Cheques Listing" as a record of entitlements in respect of unbanked cheques;
 - (b) in respect of the Futures and FX product lines, the "Dealer Reports" as records of cash claims and claims in respect of open derivative positions;¹⁵
 - (c) in respect of the Saxo product line, the "Outstanding Clients Account file" as a record of cash claims and the records maintained by SCMA as records of claims in respect of securities held by SCMA;¹⁶ and
 - (d) in respect of the IB product line, the "client summary reports" and related reports maintained by IB as a record of both cash claims and claims in respect of securities and open derivative positions.¹⁷
16. The dates for which the plaintiffs have those records (or access to them) are summarised in the First Schedule.
17. The plaintiffs are of the opinion that the material before the Court is sufficient for the parties to determine how the interests of the clients they represent would likely be affected by any pooling determination that the Court may make. The liquidators have also performed certain modelling previously undertaken at the request of the second and fourth defendants,¹⁸ which now takes into account costs notified to date.¹⁹ In respect of each product line, the modelling shows that the highest estimated dividend occurs under the scenarios specified in Table 1 in the Second Schedule. The plaintiffs do note that a number of the scenarios for which modelling was requested (scenarios 1–4 modelled at the request of the second defendants) are unlikely to lead to a realistic estimate of achievable dividends because they are based upon the value of assets in May 2015.
18. The plaintiffs have also calculated, for the parties' consideration, estimated dividends for each product line based on the surplus/shortfall calculation in section 12.1 of the Supplementary CSA Report on the alternative assumptions that (i) there is no pooling between product lines; and (ii) that all product lines are pooled. That modelling also takes into account costs notified to date.¹⁹ The results of that modelling are set out in Table 2 in the Second Schedule.

E Set-off

19. The following matters support the set-off of positive net balances against negative net balances in accounts held by the same BBYL client:
- (a) set-off would permit BBYL to, in effect, recover 100 cents in the dollar in respect of debts owed by clients to BBYL (to the extent of the positive balance);

¹⁵ See CSA Report at [3.3.2], [3.3.4], [3.4.2] and [3.4.4].

¹⁶ See CSA Report at [3.5.2] and [3.5.4].

¹⁷ See CSA Report at [3.6.2], [3.6.4] and [4.2.5].

¹⁸ That is, they have re-modelled the scenarios that were the subject of the letter from Ashurst Australia dated 18 July 2016.

¹⁹ This comprises costs paid, costs approved but not paid, costs pending approval, and costs disclosed by the parties but not yet the subject of an application.

- (b) BBYL is permitted to set-off pursuant to its client agreements (at least following a "Default Event", which includes failure by the client to punctually pay any moneys owing).²⁰
20. The following matters may militate against the set-off of positive net balances against negative net balances in accounts held by the same BBYL client:
- (a) set-off would permit clients to, in effect, recover 100 cents in the dollar in respect of any positive balances; and
- (b) set-off may be inconsistent with s 981E of the Corporations Act (although this proposition was rejected in *MF Global* at [157]).
21. Because the software used by BBYL to manage client accounts was different for each product line, the liquidators have not undertaken the time-consuming task of calculating the number of clients or quantum of claims likely to be affected by set-off.²¹ Rather, if set-off is to occur, they intend to examine whether each client who lodges a claim held any other product line account with a net debit balance in the course of adjudicating those claims.

F Low account balances

22. The plaintiffs contend that they would be justified in treating clients with a balance of less than \$100 as having no entitlement to participate in distribution of the CSAs or Recoveries in respect of each such amount. The plaintiffs estimate that this would affect 2,538 clients with claims estimated to total approximately \$78,000.²² The plaintiffs contend that such a direction is appropriate as the cost to administer each such claim would exceed the value of the claim.

G Interest

23. BBYL's client agreements provided that it was entitled to interest earned on funds held in CSAs.²³ Regulation 7.8.02(7) of the Corporations Regulations provides that a licensee is entitled to interest on an account maintained for s 981B of the Act if the licensee discloses to the client that it is keeping the interest.
24. However, the plaintiffs contend that interest is held on trust for BBYL's clients, at least until client entitlements are fully satisfied, as a result of the terms of reg 7.8.03(6) and the construction of that regulation adopted in *MF Global* at [178]-[179] (that, in effect, the licensee has last priority to payment from a CSA).

Ashurst Australia
2 August 2016

²⁰ ASX, APX and International Trading Terms cl 9.2, 19.3 and 48 (CSA Report, Appendix 9), Futures Terms cl 19.2(j) (CSA Report, Appendix 12), Desk FX Terms cl 9.1(g), Online Account Terms cl 11.1 (g).

²¹ If BBYL set-off debtor accounts in the ordinary course of its business, the quantum of claims likely to be affected by set-off might be low.

²² Supplementary CSA Report at [13.1] (p 73).

²³ ASX, APX and International Trading Terms cl 15 (CSA Report, Appendix 9), Futures PDS p 6 (CSA Report, Appendix 70), Desk FX and Commodities PDS p 14 (CSA Report, Appendix 71), Online Account Terms cl 4.4(b) (CSA Report, Appendix 16).

FIRST SCHEDULE

Product line	Cash claims	Claims in respect of securities and/or derivatives
Equity	Detailed Trust Position Report	Not applicable.
ETO	<ul style="list-style-type: none"> • 15 May 2015 • 18 May 2015 • 19 May 2015²⁴ Unpresented Cheques Listing <ul style="list-style-type: none"> • 15 May 2015 • 18 May 2015 	ASX reconciliation of Returned Collateral as at actual close out of each position.
FX	FX Dealer Report <ul style="list-style-type: none"> • 15 May 2015 • 18 May 2015 	
Futures	Futures Dealer Report <ul style="list-style-type: none"> • 15 May 2015 	
Saxo	Outstanding Client Accounts file <ul style="list-style-type: none"> • As at 15 May 2015²⁵ 	SCMA records <ul style="list-style-type: none"> • Any weekday
IB	IB records <ul style="list-style-type: none"> • Any weekday 	

²⁴ This document may have been produced when the receivers and managers controlled BBYL's business, however it is not clear whether that document would be reliable given the impact of trades that were expected to, but did not, settle on 19 May 2015.

²⁵ This document was prepared on 17 June 2015.

SECOND SCHEDULE

Table 1: Scenarios modelled at the request of the second and fourth defendants resulting in highest estimated dividend for each product line

	Equity	ETO	FX	Futures	Saxo	IB
Dividend	0.83	1.00	0.63	0.49	0.49	1.00
Scenario in which that dividend occurs²⁶	CU scenarios 4–9	CU scenarios 4–6, MO scenarios 1–5	MO scenarios 1 and 2	CU scenarios 4 and 7	CU scenarios 4 and 7	MO scenarios 1–5

Table 2: Scenarios modelled by the plaintiffs

	Equity	ETO	FX	Futures	Saxo	IB
No pooling	0.75	1.00	0.44	0.33	0.36	0.70
All funds pooled	0.57					

²⁶

Refer to Annexure 1 to the letter from Ashurst Australia dated 18 July 2016 to all parties for assumptions applied in relation to the scenarios requested by the second defendants (the **MO scenarios**). Refer to the enclosure to that letter entitled "Clayton Utz Scenario Analysis" for assumptions applied in relation to the scenarios requested by the fourth defendant (the **CU scenarios**).